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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 546

THE UNITED STATES OF AMERICA, PETITIONER

v.

PROVIDENT TRUST COMPANY OF PENNSYLVANIA AND Charles Sinkler, Administrators, Etc.

No. 547

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL Revenue, petitioner

v.

GIRARD TRUST COMPANY AND JOSEPH L. WOOLSTON, Executors, Etc.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

Provident Trust Company case

The opinion of the Board of Tax Appeals is reported in 5 B. T. A. 1004. The opinion of the United States District Court for the Eastern Dis-

trict of Pennsylvania (R. 6–8) is unreported. The opinion of the Circuit Court of Appeals (R. 11–17) is reported in 35 F. (2d) 339.

Girard Trust Company case

The opinion of the United States Board of Tax Appeals (R. 24) is reported in 10 B. T. A. 1100. The *per curiam* decision of the Circuit Court of Appeals (R. 29) is reported in 35 F. (2d) 343.

JURISDICTION

The judgments of the Circuit Court of Appeals in both cases were entered October 4, 1929. (R. 18, 30.) Petition for writ of certiorari in each case was filed December 31, 1929. Certiorari was granted January 20, 1930. (R. 31.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Revenue Act of 1921 imposes a tax upon the transfer of the net estate of every decedent dying after the passage of the Act. Section 402 (d) provides that the gross estate of the decedent shall include the value of property held by the decedent and any other persons as "tenants in the entirety" with the exception of such part of the property as may be shown to have originally belonged to the survivor. The questions presented are:

1. Whether this provision imposes a direct tax in violation of the third clause of Section 2 and

the fourth clause of Section 9 of Article I of the Constitution.

2. Whether this provision is in contravention of the due process clause of the Fifth Amendment.

STATUTE INVOLVED

The Revenue Act of 1921, c. 136, 42 Stat. 227, 277, 278, provides in part as follows:

> SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:
>
> * * * * *
>
> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible, or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent

for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;

* * * * *

By Section 403, provision is made for determining the value of the net estate by deducting certain items and an exemption of $50,000 from the ascertainable gross estate. The value of this net estate is the measure of the tax.

STATEMENT

Provident Trust Company case

The facts as set forth in the statement of claim (R. 1–4) and admitted by the statutory demurrer (R. 4–6), are as follows:

By deeds dated May 8, 1912, July 24, 1901, and September 16, 1903, premises located at 220–222–

224 South Sixteenth Street, Philadelphia, Pennsylvania, were conveyed to James K. Young and his wife, Mary Wilson Young, as tenants by the entirety. On June 19, 1923, Young and his wife conveyed these premises to one George W. Eyre for a consideration of $160,000, of which $60,000 was paid in cash and $100,000 was taken back by the grantor and his wife as ground rent to yield an annual income of $6,000, title to the ground rent being vested in them as tenants by the entirety. (R. 2–3.)

By deed dated June 23, 1923, the premises located at 244 South Twenty-first Street, Philadelphia, Pennsylvania, were conveyed to Young and his wife as tenants by the entirety. (R. 3.)

No part of the purchase price of any of the above-mentioned property was furnished by the wife. (R. 3.)

On or about August 28, 1923, Young, then a resident of Pennsylvania, died, leaving surviving him his wife, who was the sole beneficiary under his will. (R. 2.)

Thereafter the respondents, Provident Trust Company and Charles Sinkler, were appointed the administrators c. t. a. of the estate of the decedent. On or about August 26, 1924, they filed with the Collector of Internal Revenue for the First District of Pennsylvania a Federal estate tax return showing no tax liability. Upon the audit of the return, the Commissioner of Internal Revenue, acting under the provisions of Section 402 (d) of the Reve-

nue Act of 1921, increased the gross estate by $151,150, which represented the value of the ground rent, and accrued interest thereon, with respect to the property located at 220–222–224 South Sixteenth Street, Philadelphia, and the value of the property located at 244 South Twenty-first Street, Philadelphia. (R. 2–4.)

From notice of a deficiency of $1,244.43, determined by the Commissioner, the respondents appealed to the Board of Tax Appeals, which entered an order of no deficiency. (R. 4; 5 B. T. A. 1004.)

The Commissioner did not acquiesce in this decision, and suit was instituted in the District Court for the Eastern District of Pennsylvania to collect the deficiency in tax. That court held that Section 402 (d) of the Revenue Act of 1921, in so far as it required the property held by the decedent and his wife as tenants by the entirety to be included in his gross estate, was unconstitutional, and entered judgment for the administrators. (R. 9.) Upon appeal the Circuit Court of Appeals for the Third Circuit affirmed the decision of the District Court. (R. 11–18.)

Girard Trust Company case

As the Board of Tax Appeals stated in its findings of fact and opinion (R. 24) that "The facts are simple and are not in dispute," and therefore did not attempt to set them forth *in extenso,* the following statement of facts is taken not only from the Board's findings but also from the petition,

exhibit thereto, and answer filed before the Board. (R. 19–23.)

Prior to 1923 (apparently about 1910) certain real estate in Pennsylvania became vested in Beulah H. J. Woolston, the decedent, in fee simple, as her sole and separate estate, her husband, Joseph L. Woolston, not being mentioned in the deed. (R. 20, 22, 24.)

On April 27, 1923, the decedent, her husband joining in the deed, conveyed this real estate to one Guy B. Watton, his heirs and assigns, in fee simple, who three days later, on April 30, 1923, reconveyed the same to Joseph L. Woolston and Beulah H. J. Woolston, "their heirs and assigns," "as tenants by the entireties." (R. 20, 22, 24.)

Beulah H. J. Woolston died February 3, 1924. The Commissioner of Internal Revenue included in her gross estate for Federal estate tax purposes the entire value of the real estate held by her and her husband as tenants by the entirety (R. 24), and determined a deficiency in estate tax in the sum of $2,205.32. (R. 26.)

From this determination the respondents, Girard Trust Company and Joseph L. Woolston, executors of the will of Beulah H. J. Woolston, took an appeal to the Board of Tax Appeals. In the deficiency letter attached to the petition on appeal filed with the Board (R. 21–23), the Commissioner stated that no consideration whatever passed in the two transactions involving Guy B. Watton above referred to, "it being certified in the deed that the

consideration in both instances was less than $100, a merely nominal sum." (R. 22.) The respondents did not assign any error as to this finding of the Commissioner in their petition to the Board (R. 19–21), and the Board made no finding to the contrary. (R. 24.)

The Board decided that the inclusion in the decedent's gross estate of the value of the real estate held by her and her husband as tenants by the entirety was erroneous (R. 24; 10 B. T. A. 1100), and entered an order of redetermination stating that there had been an overpayment of the estate tax in the amount of $22.79. (R. 25.)

On petition for review filed by the Commissioner (R. 25–27), the Circuit Court of Appeals for the Third Circuit on October 4, 1929, in a *per curiam* decision (R. 29), sustained the decision of the Board upon the authority of the *Provident Trust Company case,* decided the same day.

The Government in both the above cases applied to this Court for writs of certiorari, which were granted. (R. 31.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

I. In affirming the judgment of the District Court in the *Provident Trust Company case* and in affirming the order of the Board of Tax Appeals in the *Girard Trust Company case.*

II. In holding that Section 402 (d) of the Revenue Act of 1921 is unconstitutional in so far as it

requires the value of property held by husband and wife as tenants by the entirety to be included in the gross estate of the deceased spouse for Federal estate tax purposes.

SUMMARY OF ARGUMENT

These decisions, holding that it was beyond the constitutional power of Congress, by Section 402 (d) of the Revenue Act of 1921, to include in the decedent's gross estate property held with the surviving spouse as tenant by the entirety, are in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Tyler case,* No. 428, which will precede these cases in argument.

The provision for inclusion of estates by the entirety in the estate the transfer of which is taxed by the Federal Estate Tax Act is within the powers of Congress. It does not impose a direct tax. Although neither the title nor the estate of the survivor was created by the death of the decedent, there was, nevertheless, a shifting of economic benefits of property upon the decedent's death, occasioned by the death. This shifting may be the subject of an estate tax. The legal fiction that the survivor of an estate by the entirety acquires no enlarged interest or right should not be held determinative here. The "transfer" which may be the basis of a tax should not be restricted to cases where the title or the property passes but may include also the relinquishment by the decedent of possession, enjoyment or control. All

the interests of the decedent spouse are terminated at his death; and the practical result of the dissolution of the estate by the entirety by the death of one spouse is to transfer to the surviving spouse an unfettered ownership in fee.

This Court held in *Bromley* v. *McCaughn*, 280 U. S. 124, that a tax on gifts *inter vivos* is not a direct tax. Upon the principles applied in that case there can be no constitutional objection to a transfer tax payable at death on the value of property owned by a decedent and conveyed by him to himself and wife as tenants by the entirety after the effective date of the tax Act. If, instead of conveying the property, he had retained it until his death, its value would have been included in the computation of his estate subject to the estate tax. If he had given it to his wife outright during his lifetime, the gift could have been taxed by an Act passed before the date of the gift. If, instead of pursuing either of these courses, he makes a conveyance which operates both as a gift to his wife and as a retention of an interest in the property in himself, the cessation of that interest at his death is a legitimate occasion for a tax.

The tax involved here is properly measured and is neither arbitrary nor capricious, and so does not violate the Fifth Amendment. The tax is imposed upon the "transfer of the net estate" and its amount is the sum of certain percentages of the value of the "net estate." It is necessary to set up this artificial entity as the measure of the tax and

include therein designated classes of property, in order that certain dispositions of property made by a decedent during his lifetime, but actually testamentary so far as their ultimate effect is concerned, may be reached. The inclusion of estates by the entirety in the taxable net estate is necessary to prevent tax avoidance and it may consequently be supported as a necessary adjunct to the taxation of testamentary transfers, even if standing alone its constitutionality might have been subject to doubt.

ARGUMENT

These cases present questions identical with those in the case of *James E. Tyler, Jr., and William G. Tyler, Administrators of the Estate of James E. Tyler, petitioners,* v. *United States of America,* No. 428, now before this Court on a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

The facts in these cases are similar to those in the *Tyler case* and the same propositions of law are applicable. The pertinent statute here is the Revenue Act of 1921, while in the *Tyler case* the Revenue Act of 1916 was involved, but the differences between the two statutes are immaterial to the questions concerned. (See pp. 29–30 of the Government's brief in the *Tyler case.*)

As these questions are fully argued in the brief for the United States in the *Tyler case,* the petitioners adopt, by reference, the argument in that brief.

In the *Girard case* the item of property in dispute belonged to the decedent, the wife, until April 27, 1923, after the passage of the Revenue Act, and it was not until April 30, 1923, that it was conveyed to her and her husband as tenants by the entirety. It does not appear that the husband, the survivor, furnished any part of the consideration for the purchase of the property originally.

In the *Provident case* one of the items of property in question, the real estate at 244 South Twenty-first Street, was not conveyed to the decedent and his wife as tenants by the entirety until June 23, 1923, after the effective date of the applicable Revenue Act. The situation is similar as to the other item of property. The title to the ground rent, which the Commissioner included in the gross estate, was not vested in the decedent and his wife until June 19, 1923. Although it was part of the consideration for the conveyance of property which had belonged to the decedent and his wife as tenants by the entirety prior to the date of the passage of any Act providing for a Federal estate tax, the fact remains that the tenancy in the property included in the gross estate did not arise until after that date, and indeed, if that were necessary, until after the passage of the Act of 1921. No part of the purchase price of any of the property was furnished by the survivor, the wife. (R. 3.)

It appears that all of the items in question were originally owned by or were purchased by the decedent alone. It does not appear that any interest

in the property was given to the survivor by a third person. As to all items, it is consequently clear that the taxpayers have no ground for complaint. Although the findings in regard to some of the matters are somewhat meager, the lacunæ are of no avail to the taxpayer. It is settled that in an action like this the taxpayer carries the burden of establishing all facts necessary to a recovery. *Reinecke* v. *Spalding*, 280 U. S. 227; *Botany Mills* v. *United States*, 278 U. S. 282; *United States* v. *Mitchell*, 271 U. S. 9; *United States* v. *Anderson*, 269 U. S. 422. It is also settled that an assessment made by the Commissioner is *prima facie* correct. *Wickwire* v. *Reinecke*, 275 U. S. 101, 105; *United States* v. *Rindskopf*, 105 U. S. 418, 422.

CONCLUSION

It is respectfully submitted that the judgments of the Circuit Court of Appeals for the Third Circuit in both cases herein should be reversed.

WILLIAM D. MITCHELL,
Attorney General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
SEWALL KEY,
J. LOUIS MONARCH,
RANDOLPH C. SHAW,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

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